SEP 13 1972

In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-122

VASSER BISHOP, as Executrix of the Estate of David H. Bishop, Deceased,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

REPLY BRIEF
FOR
VASSER BISHOP, PETITIONER

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UNITED STATES OF AMERICA, Respondent

REPLY BRIEF FOR VASSER BISHOP, PETITIONER

Vasser Bishop, petitioner, replying to certain statements and arguments contained in the brief for the United States in opposition to her petition for a writ of certiorari, comments and says:

1. Statements with respect to ownership of securities.

An issue which the District Court did

not let a jury decide but which is a basic factual issue in the case is the nature of the ownership by Dr. and Mrs. David H. Bishop of the securities here involved.

Vasser Bishop says her parents owned the securities as tenants in common, not as joint tenants, despite the form in which the securities were registered. She is supported in this position by the pleadings, depositions, and other materials in the record which the District Court under Rule 56, Federal Rules of Civil Procedure, was permitted to take into account on the motions for summary judgment. She is further supported by Mississippi decisions cited on pages 26 and 27 of her petition.

The United States takes the position that the form of the registration of the securities controls the ownership. Since the securities were registered in the name of Dr. and Mrs. Bishop as joint tenants when Mrs. Bishop died on October 3, 1961, of necessity--according to the United States--Dr. and Mrs. Bishop were joint owners.

But the matter of ownership is clearly an issue of fact. Here is a statement from the United States brief in opposition to the Bishop petition:

> "Dr. and Mrs. David H. Bishop, residents of Mississippi, owned various

securities and bank accounts as joint tenants with the right of survivorship." (U.S. Br. 2)

There are other similar statements. (U.S. Br. 3-4, 6)

This court should, it is submitted, not accept those statements as statements of fact. They represent contentions by the United States not yet determined by a jury. A jury--if permitted to do so--may find for the United States or for Vasser Bishop. It is premature at the moment, however, to state as an undisputed fact that Dr. and Mrs. Bishop were joint owners of the securities.

Vasser Bishop will be content to abide by a jury decision with respect to ownership.

2. Language of Mrs. Bishop's will.

The United States draws great comfort from the fact that Mrs. Bishop in her will dated July 5, 1958, (A. 29) used the words "joint ownership. . .with right of survivorship" with respect to her estate.

But again those words were not necessarily used in their technical, legal meaning. The will was wholly in the handwriting of Mrs. Bishop, a lay person, unfamiliar with legal drafting.

To petitioner the significant aspect

of Mrs. Bishop's will is that she made a testamentary disposition of her estate "now in joint ownership." She felt she could dispose of her securities by her will; she did so. A bequest of her securities to her husband would have been completely superfluous if their ownership was really in joint tenancy, as the United States maintains to be the fact.

3. Language of Dr. Bishop's will.

Dr. Bishop's will, also holographic, was dated November 8, 1958, (R. 54). He says:

> "2. I make note of the fact that all of our material possessions are owned in common by my wife and myself, share and share alike...
>
> 5. The greater part of our estate is invested in stocks. I will that my equal share of these at my death shall pass to the entire possession of my wife." (A. 24) (Emphasis supplied)

Dr. Bishop's will was written after Mrs. Bishop's by some months. Again it made a testamentary disposition of the stocks to his wife--wholly unnecessary if they really were held in joint tenancy.

All the credible, admissible evidence which the District Court should have considered on the cross-motion for summary

judgment corroborates the language of Dr. Bishop's will. The action of the District Court in relying only on the form of the stock registration was error.

4. Stocks disclaimed never Dr. Bishop's.

The securities which Dr. Bishop disclaimed were securities which he never considered to belong to him, which he never claimed, and which never were registered solely in his name.

His first disclaimer document was dated November 27, 1961; it listed various securities which "were inherited by Mrs. Mary H. Bishop from her parents, and . . . /Dr. Bishop/, in accordance with statute, refuses to accept ownership of the said stocks and disclaims all interest in them." (A. 25)

These securities were included at their full value in Mrs. Bishop's estate, and her estate tax computed accordingly. (R. 91)

The disclaimer supplement executed by Dr. Bishop was dated January 29, 1962. The securities disclaimed by Dr. Bishop in that instrument were again securities which Dr. Bishop did not consider to be his: they represented one-half of the total number of shares of stock in the corporations listed which were registered in the name of Dr. and Mrs. Bishop. The

half of the shares disclaimed in each company was that half the ownership of which was attributable to Mrs. Bishop.

Thus, Dr. Bishop disclaimed 75 shares of American Agricultural Chemical Company stock. (A. 28) At the time of Mrs. Bishop's death, 150 shares of stock in that company were registered in the names of Dr. and Mrs. Bishop. (R. 92) And so on down the list.

Petitioner has been completely frustrated in getting the District Court and the United States to recognize this important distinction.

The District Court, for example completely misread the disclaimer supplement. That court said:

> "Unlike the original disclaimer the supplement thereto described the Securities therein disclaimed as stocks owned equally by Dr. Bishop and Decedent." (P. Br. 37; A. 31; R. 321)

That is not at all the language of the disclaimer supplement. The supplement recited:

> "Whereas, David H. Bishop and his wife Mrs. Mary H. Bishop owned all their interests in corporations listed below equally, and the

> respective shares listed represent the one-half number of shares of such corporations whose ownership is attributable to Mrs. Mary H. Bishop individually; . . ." (R. A. 27)

Petitioner wrote in her original brief in this court it was this important error of the District Court which she felt an oral argument in the Fifth Circuit might permit her to correct. (P. Br. 33)

Yet the United States repeats the error in its brief in opposition. The United States declares:

> "Unlike the original disclaimer, the supplement described the disclaimed property as owned 'equally' by them." (U.S. Br. 4)

That statement simply is wrong--and about a matter of great significance.

This error of fact pronounced by the District Court and accepted by the United States may well explain why petitioner has had to follow the long road all the way to the Supreme Court of the United States in order to obtain a proper ruling on the law applicable in this case.

5. Important reasons for further review.

The United States argues:

> "The decision below is correct. There is no conflict of decisions or other reason for further review." (U.S. Br. 6)

Vasser Bishop agrees she has found no conflict in decisions of the sort which ordinarily supports an appeal. Other lower courts have not, however, been called on to decide the issues involved in this appeal.

But there are abundant reasons for further review.

a. The lower courts have decided an important Mississippi question regarding ownership of securities in a way in conflict with applicable Mississippi law.

The Mississippi decisions on the point have all said ownership is a question of fact not of form. (Cases collected Pet. Br. 26 and 27)

The decision of the District Court, affirmed by the Fifth Circuit, rejects this principle.

b. An important question of federal law is involved which has not been, but should be, settled by this court.

The United States recognizes that generally disclaimers of testamentary gifts are valid and not taxable as gifts,

"and in a few states disclaimers of intestate gifts may also be valid." (U.S. Br. 8)

The United States asserts that the disclaimers of Dr. Bishop constituted taxable transfers under Sections 2501 and 2511 of the Internal Revenue Code and Section 25.2511-1(c) of the Treasury Regulations on Gift Tax. (U.S. Br. 6, 13, 15)

The United States argues there is "no law in Mississippi (or elsewhere apparently. . .) which gives validity to a disclaimer of the nontestamentary, non-intestate interest acquired by a surviving owner of jointly held property." (U.S. Br. 8)

The issue has not been raised in the Mississippi Supreme Court. The actions of David H. Bishop were, however, approved by the Mississippi Chancery Court in which Mrs. Bishop's estate was being administered. (R. 169) The United States was, of course, not a party to the administration proceeding.

As for "elsewhere," the right of a surviving joint tenant to renounce ownership of a joint bank account was explicitly recognized by the highest court in New Hampshire in the case of Bradley v. State of New Hampshire, (S. Ct. N.H., 1956) 123 A.2d 148. The court said:

> "We conclude in this case that the survivor's 'right * * * to the immediate ownership' of the accounts to which the taxing statute refers, RSA 86:8, was one which she had the power to disclaim or waive. This she seasonably did on the same day that the existence of the accounts first came to her knowledge. The disclaimer related back to the date on which the accounts were established as joint ones with the result that the accounts became a part of the deceased tenant's estate."

The same right should be established as federal law unless there is local law in direct conflict.

There is no Mississippi law to support the position of the United States that Dr. Bishop could not disclaim ownership of that part of the jointly registered securities which he considered to be Mrs. Bishop's by reason of her family inheritance and other means of acquisition. Joint tenancies are in fact not favored in Mississippi. §834, Mississippi Code of 1942, as amended.

It has been said that the Internal Revenue Code and regulations "adopt a 'heads-I-win--tails-you-lose' approach with respect to the application of marital deduction rules to renunciations." Dobbs: Renunciations and Disclaimers--Boon or Bane? (1964) 50 ABA Journal 590, 592.

The case at bar offers an excellent opportunity to guide the Internal Revenue Service into a construction of gift tax regulations in such a manner as to abolish archaic and unrealistic distinctions based on vested and nonvested property rights and to exempt from gift tax all renunciations which are legally effective under local law--including renunciations of property registered in joint tenancy when the property renounced is taxed as a part of the estate of the tenant who first died.

Dr. Bishop's renunciation of securities was unequivocal, timely, complete, and not preceded by inconsistent acts evidencing acceptance or indicating the exercise of control over the property renounced. He had no free hand in selecting any "donee"; Mrs. Bishop's will controlled succession after Dr. Bishop's renunciation.

Under these circumstances it should be clear that federal law permits no gift tax to be imposed.

c. The Court of Appeals so far sanctioned the departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

Vasser Bishop has pointed out that the District Court improvidently granted

the cross-motion of the United States for summary judgment. (Pet. Br. 23-29)

Petitioner also showed that the District Court erred in not applying the three-year statute of limitations applicable on the facts of this case. (Pet. Br. 29-31)

The Court of Appeals sanctioned these departures of the District Court from the accepted and usual course of judicial proceedings by affirming--without opinion and on the summary calendar without permitting oral argument--the judgment of the lower court. (Pet. Br. 53-57)

These actions call for an exercise of the Supreme Court's power of supervision by granting petitioner's request for writ of certiorari.

6. Is it appropriate for this Court to review determination of lower courts on local law?

Of course it is--when the lower courts are apparently wrong in their determinations.

In the case of Sims v. United States, 359 U.S. 108, 114, cited by the United States, this court said the decisions of the lower courts on West Virginia law then under review appear "to be founded on reason and authority." That

is not the fact here.

The District Judge wrote that the Mississippi "Release of Power of Appointment Act" had not been the subject of judicial interpretation and "this Court must give the Act the interpretation which he believes a Mississippi Court would give it." (Pet. Br. 45)

When that interpretation and interpretation of ruling case law is wrong and significant rights of parties are affected by the interpretations, of course this Court should review.

7. Rule of U.S. v. Jacobs.

The case of United States v. Jacobs, 306 U.S. 363, 370-371, deals with a recognized situation of joint tenancy. Vasser Bishop denies that the ownership of securities by her parents was really in joint tenancy, but says that the form of ownership happened to be joint tenancy when her mother died.

The nature of the ownership is a factual question. The question should be submitted to a jury. Jacobs has no application here.

8. Rule of Com'r v. Estate of Bosch.

The United States cites Commissioner v. Estate of Bosch, 387 U.S. 456, as

authority for the proposition that, absent a decision of Mississippi's highest court to the contrary, the conclusion of the lower federal courts as to Mississippi law in this case should be accepted as correct. (U.S. Br. 8-9)

That is not the rule of Bosch. Rather Bosch says--and Vasser Bishop recognizes--that a federal court or agency is not conclusively bound by a state trial court's adjudication of state law when the United States is not a party to the proceeding. But this court has no reason to accept as conclusive an adjudication of Mississippi law by lower federal courts where the Mississippi Supreme Court has not spoken and the lower federal courts have reached an erroneous conclusion about Mississippi law.

9. There was no trial in the District Court.

The arguments of the United States in its brief in opposition proceed as if there had been a trial in the District Court both of the factual issue of ownership of securities and the issue with respect to knowledge by the United States of facts involving the disclaimers which would invoke the three-year limitation statute.

The case did not go to trial. There is no complete record. The decision of

the District Court was on motion and cross-motion for summary judgment. Its action in preventing a trial of disputed issues of fact has resulted in grave injustice for petitioner and others interested in the estate of David H. Bishop.

CONCLUSION

The amount of taxes here involved is not large by many standards.

A decision in this case will provoke no great headlines.

But to petitioner and her sisters this case has great importance. It is believed to be the only experience with litigation that has touched their lives. Their parents--frugal, university-oriented, unsophisticated in the field of "estate planning" or "tax avoidance"--never during their long life spans participated in an adversary court proceeding.

Here then, in the first encounter with the courts affecting his estate, Dr. Bishop (through his executrix) was denied the right for a jury to pass on material issues of fact affecting the ultimate outcome of this litigation. Surely this court can remedy this error through its power of supervision.

For the reasons stated herein as well as those given in her original petition and brief, Vasser Bishop respectfully renews her prayer that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Lomax B. Lamb, Jr.
Attorney for Vasser Bishop, Executrix of the Estate of David H. Bishop
Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing Reply Brief for Vasser Bishop, Petitioner, have been served upon the Defendant by placing the same, air mail postage prepaid, in the United States mail, addressed to:

Honorable Erwin N. Griswold
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

This the 11 day of September, 1972.

Lomax B. Lamb, Jr.